set aside as to him in his individual capacity.

OPINION OF THE COMMISSION

This matter is before the Commission upon a petition filed January 10, 1967, by respondent Clifford L. J. Siegmeister, re-

questing that the final order issued herein on February 28, 1964 [64 F.T.C. 1018], be set aside as to him in his individual capacity. The Director, Bureau of Deceptive Practices, has filed an answer in opposition to the request.

Although not cited by the petition, the validity of this request must be determined under § 3.28 (b) (2) of the Commission's Rules which provides, in part, that "Whenever any person subject to a decision containing an order to cease and desist which has become final is of the opinion that changed conditions of fact or law require that said decision or order be altered, modified or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceeding for that purpose."

The complaint in this matter issued on January 8, 1959, charging two corporations and fourteen persons in their official capacities and individually with certain unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act. An answer was filed on March 9, 1959, purportedly on behalf of the two corporations and certain of the individual respondents, including petitioner. In effect, the answer admits that certain of the individual respondents, again including petitioner, formulated, directed and controlled the acts and practices of the corporate respondents, including the practices set forth in the complaint. However, the answer specifically denies this charge as to three of the named individuals on behalf of whom the answer was filed.

Service of the complaint upon petitioner was effected by registered mail at the principal office of the corporation of which he was a vice president in charge of sales. As a first grounds in support of his request, petitioner states that the person who signed the return receipt was not authorized to accept personal service for him as an individual. He further states that he never received a copy of the complaint and was not aware that he had been named in his individual capacity. Moreover, petitioner states that he never authorized anyone to file an answer in his behalf, and that the statement in the answer which constitutes an admission that he formulated and controlled the company's acts and policies, is completely inaccurate.

Petitioner states that he resigned from the company on December 2, 1959, and alleges that it was not until after the Commission issued its Final Order in February, 1964, that he learned that he had been named in the order to cease and desist. However, in this regard, the record discloses that on September 12, 1962, petitioner was personally served with a copy of the hearing examiner's order correcting an error in the initial decision and that service was

effected at the offices of the Waltham Watch Company in New York City. Also, as shown by the record, a copy of the initial decision and the order correcting an error therein were served upon petitioner on September 14, 1962, by delivery thereof to the receptionist of the Waltham Watch Company at its place of business in New York City. Petitioner does not make specific reference to the service of these documents and the evidence of such service would appear to refute his contention that he was unaware that he had been named individually in this proceeding until after issuance of the Final Order.

As a second grounds in support of his request, petitioner states that contrary to the admission in the answer, he had nothing to do with formulating or controlling sales policy of the corporate respondent of which he was an official. In support of this contention, petitioner has submitted two affidavits. One of these is by a former official of Benrus who left the employment of that company before issuance of the complaint. The other is that of the private secretary to Mr. S. Ralph Lazrus who was an official of Benrus until his death in September, 1959.

Affiants state that the title accorded to petitioner as a vice president in charge of sales did not vest in him the right or duty to formulate or control policy. Affiants base their statements on the asserted belief that the policies of Benrus were under the sole supervision and jurisdiction of Mr. S. Ralph Lazrus. That this is not an accurate premise, however, is evidenced by the testimony of two Benrus officials, who are named in the order in their individual capacities, which establishes that they also formulated, directed and controlled the acts and practices of the company.

As stated in the petition, petitioner engaged an attorney to file an appeal to the United States Court of Appeals, requesting that the order be set aside as to him in his individual capacity. In support of his argument, petitioner alleged in his appeal brief that there is no evidence that he had any individual responsibility for any of the practices involved, and that he severed his connection with Benrus in 1959. The court held that counsel supporting the complaint had a right to rely on the admission in the answer and that it was not erroneous to include petitioner in the order even though he had nothing to do with Benrus policies at the time of his petition, if he occupied a policy making or directing position during the period of the violations charged in the complaint. Petitioner raised no issue before the court concerning the validity of service of the complaint nor did he allege that he was unaware that he was named individually until after the date of the Final Order. Moreover, as pointed out by the court, petitioner's pleading

did not actually deny that he was engaged in formulating, directing and controlling Benrus policies and practices prior to issuance of the complaint.

Petitioner does not rely on a changed condition of fact or law in support of his request. Under the foregoing circumstances, and considering the evidence of record negating the grounds advanced by petitioner, it is the Commission's opinion that reopening this proceeding for the purpose of setting aside the order as to petitioner is not warranted in the public interest and that petitioner's alternative request for a hearing for the purpose of receiving additional evidence is not justified. Accordingly, the petition is denied and an appropriate order will be entered.

Commissioner Elman did not concur.

ORDER DENYING PETITION

This matter having come before the Commission upon petition by respondent Clifford L. J. Siegmeister, filed January 5, 1967, requesting that the order issued on February 28, 1964 [64 F.T.C. 1018], be set aside as to him in his individual capacity, and upon an answer in opposition thereto filed by the Director, Bureau of Deceptive Practices; and

The Commission for the reasons stated in the accompanying opinion, having determined that petitioner's request should be denied:

It is ordered, That the petition filed by Clifford L. J. Siegmeister on January 5, 1967, be, and it hereby is, denied.

Commissioner Elman not concurring.

THE KROGER CO.

Docket 7464. Order, March 1, 1967

Order remanding case to hearing examiner for the purpose of exploring possibilities for a settlement.

ORDER OF REMAND

On February 15, 1967, the hearing examiner certified to the Commission various motions filed by respondent. The examiner's certification contains the following general recommendation:

In view of the longevity of this case, the admitted need for additional information, and the prospects that this matter will not be ripe for hearings in the near future, the hearing examiner suggests that it might be fruitful to

delay action on the three motions for 30 days to explore the possibilities of a settlement. In this connection, it should be noted that no such opportunity was afforded respondent prior to the August 10, 1966, amendment of the complaint. Furthermore, a consent order has been recently accepted by the Commission *In the Matter of Winn-Dixie Stores*, Docket No. C–1110, September 14, 1966 [70 F.T.C. 611], which might form the basis for a settlement here. Finally, the Commission on January 17, 1967, announced its "Enforcement Policy with Respect to Mergers in the Food Distribution Industries" which referred to its prior actions in the *Winn-Dixie* and other food cases. By its announcement, the Commission spelled out *"its future enforcement policy in this important area."* [Emphasis added.] Since respondent's most recent acquisition took place prior to these significant developments, settlement discussions would not appear to be inappropriate.

Accordingly, without at this time reaching or determining the questions presented by the motions certified to the Commission,

It is ordered, That this matter be, and it hereby is, remanded to the hearing examiner for the purpose of exploring the possibilities of a settlement, and that the hearing examiner report to the Commission in thirty (30) days as to the status of such discussions.

Commissioner MacIntyre not participating.

CROWELL-COLLIER PUBLISHING COMPANY ET AL.[1]